Case No. D88/01

Penalty tax – whether a reasonable excuse for omission in returns – whether risk of offence being repeated factor for reduction – least serious category for additional tax.

Panel: Ronny Wong Fook Hum SC (chairman), Shirley Conway and Vernon F Moore.

Date of hearing: 21 September 2001.
Date of decision: 5 October 2001.

The taxpayer failed to include in his earnings as the general manager of Company A the gains which he realised under the share option scheme of Company A. The Commissioner imposed additional tax of about 9.75% and 9.56% of the amount of tax undercharged. The taxpayer appealed against such assessments.

The taxpayer explained that he came to Hong Kong in 1991. There was no inaccuracy in his returns before and he had no previous experience in relation to share option. The taxpayer relied on the advice of his representative in submitting his returns and did not read the ' small prints' when submitting his returns. The taxpayer is now unemployed and his wife suffered severe brain damage from an accident in 2001. The taxpayer urged for the most lenient penalty for his transgressions.

Held:

The Board is of the view that the taxpayer has no reasonable excuse for his omission but the Board is impressed by the taxpayer' s sincerity and has little doubt that he will take care in the future. The risk of the present offence being repeated is minimal. Given this case falls within the least serious category in the guidelines promulgated by the Revenue for imposition of additional tax, the Board believes that the penalty imposed is too high (D76/99 followed).

Appeal allowed in part.

Case referred to:

D76/99, IRBRD, vol 14, 525

Kwok Hok Chuen for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. On 4 July 1998 and 9 June 1999, the Taxpayer submitted his returns in respect of his earnings for the years of assessment 1997/98 and 1998/99 as the general manager of Company A. Messrs Arthur Andersen & Co was then his authorised representative. The Taxpayer failed to include in these returns the gains which he realised under the share option scheme of Company A. The amount involved was $911,759 for the year of assessment 1997/98 and $418,255 for the year of assessment 1998/99. After considering representations of the Taxpayer, the Commissioner by notice dated 31 May 2001 imposed additional tax of $12,000 for the year of assessment 1997/98 and $6,000 for the year of assessment 1998/99. The additional tax so imposed is about 9.75% and 9.56% of the amount of tax undercharged. This is the Taxpayer's appeal against such assessments.

2. At the hearing before us, the Taxpayer explained that he came to Hong Kong from Country B in about 1991. There was no inaccuracy in his returns till the year of assessment 1997/98. He had no previous experience in relation to share option. He relied on the advice of Messrs Arthur Andersen & Co. He candidly admitted that he did not read the 'small prints' when submitting his returns. Company A terminated his employment on 31 August 1998. His wife suffered an accident on 28 May 2001 leaving her with severe brain damage. He is still unemployed and he urges us to impose the most lenient penalty for his transgressions.

3. Mr Kwok for the Revenue drew our attention to D76/99, IRBRD, vol 14, 525. The taxpayer there failed to report the gains he made from his share option. The Board took into account the taxpayer's impressive history of compliance (over 20 years without default); the unlikelihood of the offence being repeated due to the taxpayer's emigration from Hong Kong and the fact that it was the first time that he came across gain of that nature. The Board reduced the additional tax in that case to about 4.57% of the tax undercharged. Mr Kwok seeks to distinguish the present case from D76/99 on the grounds that the Taxpayer's umblemished record is much shorter than 20 years and there is no suggestion that the Taxpayer would be leaving Hong Kong. Mr Kwok, however, accepts that this case falls within least serious category in the guidelines promulgated by the Revenue for imposition of additional tax.

4. We are of the view that the Taxpayer has no reasonable excuse for his omission. However, his case is similar to D76/99. We are impressed by the Taxpayer's sincerity and have little doubt that he will take care in the future. The risk of the present offence being repeated is minimal. Given the concession of Mr Kwok referred to above, we believe the penalty imposed is too high. We would revise the same to $6,000 for the year of assessment 1997/98 and $3,000 for the year of assessment 1998/99.